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No. 82-1444

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY STOUTT,

Petitioner,

v.

STATE OF OREGON, ex rel
ADULT AND FAMILY SERVICES DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

In his statement of the case, petitioner has sketched a one-sided procedural history. This would not ordinarily elicit a response. Petitioner has also, however, for the first time, coupled his constitutional claim with a broad-gauged attack on the fairness of the proceedings which led to the finding that he was the father of Ms. DeShazer's child. An account of the filiation procedures in this case is therefore compelled. The following procedural history demonstrates that petitioner was afforded substantial

procedural leniency precisely because he was uncounseled.

On January 29, 1980 the Petition in Equity to Establish Paternity was filed alleging petitioner to be the father of Christopher DeShazer. A hearing was held on February 29, 1980 at which petitioner denied paternity. Petitioner also stated that an attorney had agreed to represent him. He was informed of his right to secure comparative blood testing, his right to trial by jury, and his right to be represented by an attorney.[1]

On March 11, 1980, petitioner was deposed. He was uncounseled at the deposition. Also on March 11, petitioner was sent a letter which informed him that pursuant to ORS 109.250 any party may request blood tests. A subsequent letter sent to him on June 17, 1980 informed him, *inter alia*, that,

> "You may request blood tests. The results of the tests may be used to prove or disprove that you are the father of the child. These tests are expensive and you will have to bear the costs of the tests. The state, however, will reimburse you if you are found not to be the father."

On August 11, 1980 petitioner was served with Requests for Admission pursuant to ORCP 45, a procedural rule similar to FRCP 36. Among other things, petitioner was asked to admit that he and Ms. DeShazer had sexual intercourse during the

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[1]This is not to imply, of course, that petitioner was informed that he had a right to appointed counsel; merely that he had the right to be represented.

months of August, September, and October of 1978 and that he and Ms. DeShazer had a steady social and sexual relationship from September, 1977 to December, 1978. The Request states, in capital letters at the outset: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Petitioner failed to respond to the requests for admissions and subsequently failed to appear at call when the time and date of the dispositional hearing was established.

On January 15, 1981 a hearing was held and petitioner attended without counsel. Prior to the hearing the trial judge said, "What we will do is try the matter as a default proceeding and in the event he (petitioner) wishes to move to set the matter aside, he will have 30 days in which to do it." At one point during the hearing, petitioner was asked, "You stated you had sexual relations. Did you use any kind of prophylaxis?" He answered, "No. She said she was on the pill, but I guess she wasn't." The court recognized that petitioner effectively had admitted paternity. He termed the admission "a devastatingly conclusive indication of paternity." At the conclusion of the hearing, the court found petitioner to be the father of the child and announced:

> "In the event that Mr. Stoutt feels that he has a defense other than that of bare denial, the matter can be reheard if a lawyer on his behalf or he on his behalf files a verified answer denying paternity in the course of the period of 30 days from today, and thereupon this matter will be given expedition on the trial docket for a contested hearing at which time he may apply for a trial by jury."

This proviso was included in the judgment order.

On February 6, 1981, petitioner filed an affidavit of indigency and a motion for appointment of counsel. On March 2, 1981 petitioner appeared at a hearing on the motion and was represented by his present counsel, a cooperating attorney for the American Civil Liberties Union. He moved to stay proceedings and for the appointment of counsel. These motions, the only ones offered, were denied. The only error petitioner assigned on appeal was error in failing to appoint counsel.

In light of this procedural history, petitioner's claims that the Oregon Court of Appeals "disregarded obvious procedural errors" (Pet. at 23), which "denied Jeffrey Stoutt any meaningful opportunity to be heard in his own defense" (Pet. at 23), and "sanctioned an adjudication which was fundamentally unfair . . . one-sided and procedurally flawed" (Pet. at 23) are not supported by the record. The Court of Appeals ruled on the only claim counsel raised—the constitutionality of the failure to appoint counsel. No other claims reasonably could

have been raised because the trial court's extraordinary solicitude for petitioner's interests and the interests of fairness in general rendered those claims barren.

REASONS WHY THE WRIT SHOULD BE DENIED

The general approach to the inquiry whether a particular procedural safeguard is mandated by the Due Process Clause of the Fourteenth Amendment[2] is outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334-335.

Two recent Supreme Court cases considering related issues have eased the analytic task of determining whether due process requires the state to pay for counsel for indigent defendants in filiation proceedings. *Little v. Streater*, 452 U.S. 1 (1981);

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[2]The Due Process Clause reads: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

In *Little v. Streater*, *supra*, this Court concluded that, under Connecticut's peculiar paternity procedure, indigent defendants were entitled to state-financed blood tests. The Court noted that when certain blood groupings are present, a blood test is absolutely reliable to exclude the paternity of a falsely accused putative father. *Little v. Streater*, *supra*, 452 U.S. at 6-8. The Court also relied on Joint AMA-ABA Guidelines for the assessment that the blood test provided "* * * a 91% cumulative probability of negating paternity for erroneously accused Negro men and 93% for white men." *Id.* at 8.

The Court observed that, "The nature of paternity proceedings in Connecticut also bears heavily on appellant's due process claim." *Id.* at 635. Of particular importance was the fact that, under Connecticut law, the mother's testimony that the putative father in fact fathered the child constitutes a prima facie case which cannot be rebutted solely by the testimony of the putative father:

> "Under Connecticut law, therefore, the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that relia-

ble scientific proof by requiring that he bear its cost. [citation omitted]. In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him. If the plaintiff has been 'constant' in her accusation of paternity, the defendant carries the burden of proof and faces severe penalties if he does not meet that burden and fails to comply with the judgment entered against him. Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." *Id.* at 12.

The Court then specifically addressed the *Mathews* factors. It first outlined the private interests at stake, holding that, "Just as the termination of such (familial) bonds demands procedural fairness [citing *Lassiter v. Department of Social Services, supra*], so too does their imposition." *Id.* at 637. It then stressed both the accuracy of the blood test definitively to exclude a high percentage of falsely accused putative fathers and the state's onerous evidentiary rule. The Court also stressed that, while the cost of a blood test in Connecticut had risen to $460.00, 75 percent of that cost is borne by the federal government pursuant to 42 U.S.C. § 655(1)(a). The Court concluded,

"Assessment of the *Mathews v. Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity

case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.' *Boddie v. Connecticut, supra* at 377, 92 S. Ct. 780, 29 L. Ed.2d 113.

"* * * * *

"We hold that in these specific circumstances, the application of Conn. Gen. Stat. 46b-168 (1981) to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment." *Id.* at 16-17.

In concluding that due process compels state-financed blood tests the Court placed substantial reliance on the Connecticut evidentiary rules which disable the putative father from demonstrating lack of paternity.[3] *Little v. Streater*, therefore may well be confined to its procedural facts. In any event, the putative father in the present case does not seek to have the state pay for a blood test, which is both inexpensive and highly probative. He seeks to have the state pay for the appointment of counsel.

In *Lassiter v. Department of Social Services, supra*, this Court addressed the claim that indigent defendants in parental rights termination proceedings are entitled, as a matter of due process, to

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[3]No such evidentiary burden exists in Oregon; and, in fact, the testimony of the parent or expectant parent is insufficient to establish paternity without corroborating evidence. ORS 109.155. Under these circumstances, it is highly questionable whether due process imposes a requirement that blood tests for Oregon indigents be provided by the state.

appointed counsel at state expense. *Lassiter* holds that there is a presumption *against* a right to appointed counsel in the absence of at least a potential deprivation of physical liberty, but that this presumption can be overcome:

> "If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak * * *."

Lassiter traces the constitutional history of the right to appointed counsel. That right, as the Court notes, never had been recognized in a case in which the litigant was not exposed to a potential loss of physical liberty. *Lassiter v. Department of Social Services, supra*, 452 U.S. at 25.

> "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal cases, which triggers the right to appointed counsel * * *."

Lassiter holds that as the threat to a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.

Perhaps because of the "unique kind of deprivation" involved in termination of parental rights cases and the consequent "commanding" interest of the litigant, the Court in *Lassiter* stretched the historical limits of the right to appointed counsel by converting into a presumption the "pre-eminent generalization" that a litigant is only entitled to

appointed counsel when potential loss of personal liberty is at stake.

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." *Id.* at 26-27.

Because no loss of liberty was threatened in *Lassiter*, the court measured the three *Mathews* factors against the presumption that there is no right to appointed counsel in the absence of a potential deprivation of physical liberty. In concluding that the presumption was not overcome, the Court did not "attempt to formulate a precise and detailed set of guidelines to be followed," *id.* at 652-653; rather, the Court assessed the specific facts of the case in denying appointed counsel for Ms. Lassiter.

Lassiter states that:

> "If, in a given case, the parent's interests were at their strongest, and the state's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel." *Id.* at 31.

The Court adopted the approach established in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) for assess-

ing the necessity for appointed counsel. *Gagnon* states that, "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." 411 U.S. at 790.

The Oregon Court of Appeals' opinion in this case carefully weighed the petitioner's claim against the *Little/Lassiter* backdrop. The Court of Appeals concluded that, read most favorably to petitioner's position, *Lassiter* might apply. The Court of Appeals assumed the legitimacy of petitioner's claim under *Lassiter*, and held:

> "If anything, the facts and the issues here are even more clear-cut than those in *Lassiter*. We conclude that an attorney could have had little effect on the result in this proceeding and that defendant had no due process right to appointed counsel." *State ex rel Adult and Family Services v. Stoutt*, 57 Or. App. 303, 313, 644 P.2d 1132 (1982).

As the Oregon Court of Appeals found, if *Lassiter* were held to control in this case, there is little question on these facts that appellant was not entitled to appointed counsel. The issues at the paternity hearing were not complex; appellant essentially admitted paternity. Because the procedure and the factual issues presented were uncomplicated and because there was virtually no risk of error in the outcome, the Oregon court's holding that

appellant was not entitled to court-appointed counsel was well within the range of its discretion.

Respondent submits, however, that *Lassiter* does not control in the context of paternity cases, and the Oregon Court of Appeals gave more than necessary in analyzing petitioner's claim under it. In *Little*, this Court said that the interests of the private parties both in termination proceedings and paternity proceedings are entitled to due process protections. It did not say that they were entitled to the same protections. The extent and nature of procedural protections due in paternity cases, as in termination cases, must be determined by assessing the *Mathews* factors.

There are significant differences, both procedural and substantive, between the termination proceedings in *Lassiter* and the paternity proceedings in this case. Those differences suggest that a putative father's interest in acquiring a right to appointed counsel is insufficient to overcome a "presumption" that counsel should not be appointed.

The substantive private interests at stake in a paternity proceeding are markedly different from those at stake in a termination proceeding. In a termination proceeding, the state attempts to sever an existing parent-child relationship over the parent's objection. In a filiation proceeding, the state attempts to establish a parent-child relation-

ship solely for purposes of establishing a support obligation. A paternity proceeding does not establish a "familial bond," Supreme Court dicta to the contrary notwithstanding.[4] Whether or not any "familial bond" is developed depends entirely on the private desires of the parties. In contrast, the termination proceeding terminates a familial relation which traditionally has been granted protection by the United States Supreme Court. As *Lassiter* observes:

> "This Court's decisions have by now made plain beyond the need for multiple citation that a

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[4]In *Little*, this Court stated:

> "This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition." [citation omitted]. *Little v. Streater, supra* 452 U.S. at 13.

In the Court of Appeals, petitioner argued that this meant that filiation proceedings deserve *the same* constitutional scrutiny as that required in parental rights termination cases. The Court of Appeals apparently agreed. In footnote 4, the court states:

> "Were it not for the Supreme Court's contrary determination, we perhaps would agree with petitioner's contention that a putative father's interest in a paternity decision is not nearly as substantial as a parent's interest in a termination decision. Although the Supreme Court characterizes the decision in a contested paternity case as establishing a parent-child relationship, that relationship is almost certain to remain an unwanted one on the part of the father and one which offers no nurturing to the child. Conversely, a parent who resists termination of his or her rights in a child has an interest which goes well beyond that of a putative father who seeks to avoid the adjudication of and responsibility for his parental status." *State ex rel Adult and Family Services v. Stoutt, supra*, 57 Or. App. at 308.

Both petitioner and the Court of Appeals have, we suspect, misinterpreted *Little* in this respect. The opinion in *Little* merely indicates that the Due Process Clause applies to filiation proceedings and guarantees procedural fairness, as it does in termination cases. It does not say that a defendant's interest in filiation proceedings, which is purely financial, is of the same order as the defendant's interest in termination cases, which finally sever familial bonds.

> parent's desire for the right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois*, 404 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551. Here the State has sought not simply to infringe upon the interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. [citation omitted]. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Department of Social Services, supra*, 68 L. Ed.2d at 649-650.

The interests of parents in maintaining a parent-child relationship are significantly more important than the interest of a putative father in avoiding that relationship. A termination proceeding essentially ends any possibility that the parent ever will have a continuing contact with the child. It finally severs any family relationship between the parent and the child. A paternity proceeding, on the other hand, merely establishes the legal parent-child relationship, a fact that is, by itself, without familial substance. The putative father's interest in a paternity proceeding is exclusively pecuniary.[5]

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[5]Petitioner makes much of the fact that if he is ordered to pay child support and if he neglects "without lawful excuse" to meet his support obligation, he could be criminally prosecuted for nonsupport, a Class C felony. ORS 163.555. As the Court of Appeals' opinion notes:

> "A father of a child born out of wedlock is subject to judicial proceedings which can result in his being required to pay the same basic costs as fathers of legitimate children. If he fails to abide by that requirement, he confronts essentially the same ancillary risks as those which confront any parent who fails to support a child, *see*, ORS 163.555, and any person who violates the order of a court in a civil proceeding." *State ex rel Adult and Family Services v. Stoutt, supra*, 57 Or. App. at 314.

Just as the individual interests in a paternity case are materially different from the individual interests in a termination case, the basic issue in a paternity proceeding and the procedures for resolving that issue, unlike in termination proceedings, are simple in the extreme. Financial support aside, ORS 109.155(4), the only issue in a paternity case is whether the defendant fathered the child. That determination must be made, following a hearing, by a preponderance of the evidence. In Oregon, the mother's testimony is, by itself, insufficient to establish the operative fact. *See* ORS 109.155. Generally, the only probative evidence on the issue will be blood tests and testimony since "[t]here are seldom accurate or reliable eye witnesses [because] the sexual activities usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." *Little v. Streater*, *supra*, 68 L. Ed.2d at 634.

Given the relative simplicity of the issues involved, the "probable value, if any, of additional * * * procedural safeguards," *Mathews v. Eldridge*, *supra*, 424 U.S. at 334, is slight. Court-appointed counsel would not, in the vast majority of cases, improve the accuracy of the outcome. This fact is peculiarly evident here. There is little doubt about the accuracy of the outcome; petitioner basically

admitted paternity in open court. Given the nearly conclusive probability that the outcome in this case was in fact accurate, petitioner can hardly argue that the presence of counsel, whose task it would have been to obtain the opposite result, would have promoted accuracy. Counsel may have avoided an admission by petitioner, but that would have made the possibility of an erroneous outcome more, not less, likely.

The relatively simple factual inquiry in paternity cases stands in sharp contrast to the notoriously difficult inquiry in termination cases; cases in which expert testimony from psychiatrists, social workers, and others is employed to solve the predictive and elusive riddle of the best interests of the child. As the Supreme Court in *Lassiter* notes:

> "Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to refute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty with life, and who are, at the hearing, thrust into a distressing and disorienting situation." *Lassiter v. Dept. of Social Services, supra*, 452 U.S. at 30.

Both the substantive inquiry and the procedures for approaching it are more sophisticated and complex in termination proceedings than in paternity proceedings.

The state's interest in avoiding both the expense of appointed counsel and the cost of the lengthened proceedings which the presence of counsel inevitably

will entail is, as the *Lassiter* decision finds, "legitimate." Those costs are substantial, as the costs associated with appointment of counsel in individual criminal cases would suggest. They are certainly more substantial than the cost of the blood tests considered in *Little*, and, if this Court's statistics in *Little* are correct, they are significantly less conducive to accuracy. As compared to proceedings which threaten one's personal liberty, petitioner's fiscal interest in paternity proceedings is comparatively minor. However, if that interest is sufficiently important to require protection either through court-appointed counsel or through state-financed blood tests, the latter rather than the former undoubtedly should be preferred.

CONCLUSION

The Supreme Court, in *Lassiter*, modified a long-standing and principled tradition when it recognized the possible existence of a right to appointed counsel in a case in which the deprivation of physical liberty was not threatened. It recognized such a possibility, not because every interest which may be associated with the family-sex cluster is entitled to it, but because of the "unique kind of deprivation" which occurs in termination cases and because of the potential complexity of those proceedings. No similar factors operate in paternity cases. The Oregon Court of Appeals correctly concluded

that petitioner was not entitled to court-appointed counsel in this proceeding. The petition for writ of certiorari should be denied.

Respectfully submitted,

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